Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

JAMES O'CONNOR,

Petitioner,

vs.

CONSOLIDATED COIN CATERERS CORP.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the employer's rebuttal evidence be considered in determining whether a discharged employee makes a prima facie showing of job performance, the third element of the prima facie case under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq?*

2. May summary judgment be granted dismissing an age discrimination claim (a) without considering, as instructed by this Court, the substantial difference in age between petitioner and his replacement, and (b) without requiring respondent to prove that it would have made the same decision absent consideration of petitioner's age, there being substantial evidence connecting the decisionmaker's express statement of age bias to his contemporaneous decision to terminate petitioner?

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INTRODUCTION

Petitioner, James O'Connor, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered July 19, 1996.

OPINIONS BELOW

The District Court Opinion, App. 29-40, is reported at 829 F.Supp. 155 (W.D.N.C. 1993). The initial Circuit Court Opinion, App. 7-28, is reported at 56 F.3d 542 (4th Cir. 1995). The Opinion of this Court, reversing and remanding, is reported at ___ U.S. ___, 116 S. Ct. 1307 (1996). The Opinion of the Circuit Court on remand, App. 1-5, is reported at 84 F.3d 718 (4th Cir. 1996).

JURISDICTION

The Circuit Court rendered its Opinion on remand from this Court on June 5, 1996, again dismissing the case over a dissent. Petitioner moved for rehearing and suggested rehearing in banc in apt time. The Circuit Court denied the petition and declined the suggestion on July 11, 1996. App. 41. This Petition for Writ of Certiorari was filed within 90 days thereafter. This Court has jurisdiction to review the judgment below by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), provides in pertinent part:

> Section 623. Prohibition of age discrimination.
>
> (a) Employer Practices. It shall be unlawful for employer:
>
> (i) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age.

STATEMENT OF THE CASE

Petitioner worked for respondent, a food service company, from 1978 until August 9, 1990, when he was terminated, at age 56. Respondent is owned by and operated as a division of Canteen Corporation (Canteen). Ed Williams was Petitioner's supervisor and was president of respondent and a vice-president of Canteen. Until the end of 1989 petitioner was general manager of the region in North Carolina known as "4Cs North." Under his management this region showed a dramatic improvement in its financial performance for 1989. Petitioner's performance rating for that year was "commendable minus." A "commendable" employee is a seasoned employee who is looked upon as a production or conceptual leader within an area, and is in the top 20 percent of his group. Petitioner earned the largest incentive bonus awarded in the company that year. At the end of the year

he accepted Williams's offer of a transfer to take over "4Cs South," a region headquartered in Charlotte, North Carolina, which was floundering financially. Petitioner accepted the transfer because he relished the challenge of turning the region around. He told Williams he thought it would take about 18 months to make the turnaround.

Beginning on July 10, 1990, Williams began a two-stage process that forced petitioner out of his job. First, Williams assigned a portion of 4Cs South to 4Cs North, decreasing petitioner's territory. During the litigation Williams claimed that this change was due to petitioner's slow response in reacting to individual problem accounts and to Williams's recent discovery that petitioner had not responded to a problem involving food delivery in unrefrigerated trucks. Williams's explanation published at the time, however, said that the change was made to allow a more even distribution of the present volume of work. Williams conceded that petitioner had made progress with individual 4Cs South accounts and that the region improved during petitioner's tenure.

Then, according to Williams in mid to late July 1990, Williams's boss instructed him to consolidate all of Canteen's and respondent's operations in North and South Carolina into a single region to be run by Williams. Williams then organized this enlarged area into two new regions: South Carolina plus 4Cs South, and the remainder of North Carolina. The four managers before the reorganization were Hunter, age 57 (Canteen, North Carolina), petitioner, age 56 (4Cs South), Fi· nell, age 40 (Canteen, South Carolina) and Kiser, age 35 (4Cs North). Williams selected the 40-year-old and the 35-year-old to

run the two new regions, having considered the capabilities of all four employees in reaching his decision. Finnell took over the region previously handled by petitioner. Finnell's 1989 annual performance rating for 1989 was "competent minus," a significantly lower rating than petitioner's "commendable plus." Williams gave both of these ratings. Throughout his tenure with respondent, petitioner placed consistently higher in his salary class than did Finnell.

Williams's alleged age-neutral explanation for not selecting petitioner was belied by a series of remarks, interspersed throughout the reorganization process, that revealed severe animus against older employees. First, in late June, 1990, petitioner and Williams were in a company conference room watching the Monday playoff of the U.S. Open Golf tournament. Petitioner said he didn't think he could walk and play 18 holes of golf five days in a row. In response Williams said that petitioner was "too old." In the latter part of July Williams came into petitioner's office and said to him, "O'Connor, you are too damn old for this kind of work." Petitioner called this statement to the attention of the Manager of Employee Relations who was seated within earshot in the next office. She immediately told Williams "that he shouldn't say things like that." In response Williams left the office. This conversation may have occurred immediately after Williams was told to reorganize. The directive to reorganize came in late July and this conversation occurred in the latter part of July. Within the next week or so, two days before petitioner was terminated, he and Williams and another employee were in a company car on company business. The other employee said he was about to

turn 50. Williams said in response: "[i]t's about time we started to get some young blood in this company."

The District Court and the initial Circuit Court Opinion held, *inter alia*, that petitioner had not made a *McDonnell Douglas* prima facie case because Finnell was old enough to be protected by the ADEA. This Court unanimously reversed. 117 S. Ct. 1307 (1996). On remand, after denying the joint motion of the parties for briefing and oral argument, the panel again affirmed. It held that petitioner had failed to show the third element of the prima facie case, adequate performance. App. 4, 84 F.3d at 719-20; *see*, App. 16-18, 56 F.3d at 547. In so holding it considered the respondent's showing of inadequate job performance at the prima facie case stage, rather than at the rebuttal stage, in opposition to the rule in nine other Circuits. The Circuit Court then held that in any event petitioner had not shown that respondent's rebuttal was pretextual or that age was the true reason for his dismissal. App. 5, 84 F.3d at 720; *see*, App. 15-24, 56 F.3d at 546-50. In so holding the Court did not consider the significant age difference between petitioner and his replacement, as required by this Court's opinion, and contrary to several other Circuits held that Williams's expression of age animus at the time he made the decision to discharge petitioner was insufficiently related to his decision to be probative of causation.

ARGUMENT

I. The employer's rebuttal evidence may not be considered in determining whether a discharged employee makes a prima facie showing of job performance, the third element of the prima facie case under the ADEA.

The proponent of discrimination is burdened to show that his discharge was done with discriminatory intent. *Hazen Paper Co. v. Biggins*, 507 U.S. ___, 113 S. Ct. 1701 (1993). In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court created a presumption of discrimination that does not require a showing of intent.[1] The third element of the *McDonnell Douglas* presumption is that the applicant was rejected despite his qualifications. Once the prima facie presumptive case is made out, the burden shifts to the employer to produce evidence of a legitimate non-discriminatory reason for its action. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Plaintiff may counter by showing pretext. *Id.*

The Fourth Circuit offended this paradigm by collapsing the prima facie case stage and the employer's rebuttal stage. Ten other Circuits have, to the contrary, confined the employer's rebuttal showing in discharge cases to the second stage of the paradigm. *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1335 (1st Cir. 1988) (plaintiff need only produce evidence which, if believed, shows satisfactory job performance); *Powell v. Syracuse*

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[1] The Circuits have uniformly held that the *McDonnell Douglas* paradigm applies to ADEA cases. This Court assumed the correctness of this rule in its previous decision in this case. 116 S. Ct. at 1309-10.

Univ., 580 F.2d 1150, 1155 (2nd Cir.), *cert. denied*, 439 U.S. 984 (1978); (only "basic skills" must be shown; considering rebuttal evidence at the prima facie case stage "unnecessarily collapses" the steps of the *McDonnell Douglas* paradigm); *Siegel v. Alfawire Corp.*, 894 F.2d 50 (3d Cir.), *cert. denied*, 110 S. Ct. 2588 (1990); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1506 n.3 (5th Cir. 1988) (only a showing of basic job qualifications is required at the prima facie case stage); *Williams v. Williams Electronics, Inc.*, 856 F.2d 920, 923, n.6 (7th Cir. 1988) (prima facie case "may be based solely on the employee's testimony concerning the quality of his work"); *Korbin v. Univ. of Minn.*, 34 F.3d 698 (8th Cir. 1994); *Lynn v. Regents*, 656 F.2d 1337, 1342-45 (9th Cir.), *cert. denied*, 459 U.S. 823 (1982); *MacDonald v. Eastern Wyoming Mental Health Center*, 941 F.2d 1115, 1119-21 (10th Cir. 1991) (considering employer's evidence of performance at prima facie stage "short circuit[s]" plaintiff's opportunity to show pretext; discussing cases and concluding that "the common thread running thorough all the decisions is the Courts' refusal to consider a defendant's proffered reasons for discharge in assessing the existence of a prima facie case"); *Rosenfield v. Wellington Leisure Prod., Inc.*, 827 F.2d 1493, 1495 n.2 (11th Cir. 1987) (showing that employee held the position for a long period of time is sufficient); *Mitchell v. Baldridge*, 759 F.2d 80, 84-85 (D.C. Cir. 1985).

The Fourth Circuit's collapsing of the employer's rebuttal stage into the prima facie case stage offends the principle that the prima facie case "*triggers* the employer's burden of production," *O'Connor v. Consolidated Coin Caterers Corp.*, ___ U.S. ___, 116 S. Ct. 1307, 1310 (1996) (emphasis added), but does not *include* the

employer's showing. It also denies the plaintiff an opportunity to show pretext. Petitioner showed that he had a long history of competent performance with respondent, that he had recently received a commendable rating and a large bonus, and that 4Cs South had improved during his tenure. The Circuit Court did not accept this as a prima facie showing but rather weighed it against the rebuttal evidence in concluding that no genuine issue of competent performance had been created. It thus allowed respondent to be heard but denied petitioner the opportunity to show that the rebuttal was pretextual (which petitioner could have shown with evidence that Williams stated that the July reduction in territory was done to equalize work volume and not because of any deficient performance of petitioner, and that Williams made age-biased comments about petitioner). App. 16-18, 56 F.3d at 547; App. 4, 84 F.3d at 719-20.

II. Summary judgment was improperly granted (a) without considering, as instructed by this Court, the substantial difference in age between petitioner and his replacement, and (b) without requiring respondent to prove that it would have made the same decision absent consideration of petitioner's age, there being substantial evidence connecting the decisionmaker's express statement of age bias to his contemporaneous decision to terminate petitioner.

In its prior opinion in this case the Court stated that "the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination" than is replacement by a person outside the

protected class. *O'Connor v. Consolidated Coin Caterers Corp.*, ___U.S. ___, 116 S. Ct. 1307, 1310 (1996). On remand the Circuit Court made no mention whatever of the 16-year difference in age between petitioner and his replacement. This Court found the 16 year difference to be reliable evidence of age discrimination. The Circuit Court entirely ignored this evidence on remand.

In addition to ignoring the very evidence that this Court found to be a reliable indicator of age discrimination in this case, the Circuit Court failed to follow the teaching of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which distinguishes biased statements by decisionmakers related to the decisional process, which are probative, from non-probative "stray remarks." *See id.*, at 251-52 (plurality opinion of Brennan, J.); at 277 (O'Connor, J., concurring). Particularly, the Circuit Court held that the statement by Williams, "O'Connor, you are too damn old for this kind of work," was an insignificant stray remark unrelated to the decisional process. App. 23, 56 F.3d at 549; *see*, App. 5, 84 F.3d at 720. This statement was made by the decisionmaker, to petitioner, on company premises and company time, and at the very time of the discharge decision.[2] This statement is direct evidence of discriminatory motive, and its context is circumstantial

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[2] The "too damn old" remark occurred "in the latter part of July." R. 49 at attached O'Connor Dep. I, 46. Williams testified that he was instructed to reorganize in "late July". R. 48, Williams Affidavit, ¶ 9. Petitioner was terminated on August 9, some two weeks later. Thus the Record reasonably allows the conclusion that Williams decided to terminate petitioner at the very time of the "too damn old" remark.

evidence of causation. Williams's uttering of this statement at the very time he made the decision to discharge petitioner amply demonstrates "a discriminatory animus in the decisional process." *Id.*, at 278 (O'Connor, J., concurring).[3]

The Circuits are split on whether remarks of the type presented here are sufficiently related to the decisional process to invoke the *Price Waterhouse* requirement that the employer prove that it would have reached the same decision absent its consideration of age. *See, e.g., Beshears v. Asbill*, 930 F.2d 1348, 1353 (8th Cir. 1991) (participant in decisionmaking said older employees have problems adapting to changes; another participant said younger people were more adaptable, and told another employee he would not be happy as an installer because of his age and experience; shifting of burden under *Price Waterhouse* affirmed); *Lindsey v. American Cast Iron Pipe Co.*, 772 F.2d 779, 801-02 (11th Cir. 1985) (programmer told by division vice-president that if promotion became available, the company would be looking for a younger person; a year and a half later promotion given to employee 18 years younger than plaintiff; jury verdict for employee upheld).

This case is an appropriate vehicle to settle the disarray among the Circuits as to how connected the expression of animus must be to the decision at issue to shift the burden under *Price Waterhouse*.

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[3] This remark is a "smoking gun" but not a confession. Williams confesses his motive ("too damn old") but not its relation to the decisional process (he does not say, "you're too damn old *and therefore you're fired*"). The context supplies the relation.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted, this the 9th day of October, 1996.

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JAMES O'CONNOR, *Plaintiff-Appellant,* v. CONSOLIDATED COIN CATERERS CORPORATION, *Defendant-Appellee.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. *Amicus Curiae.*	No. 94-1214

On Remand from the United States Supreme Court.
(S. Ct. No. 95-354)

Decided on Remand: June 5, 1996

Before HAMILTON and LUTTIG, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge Hamilton wrote the majority opinion, in which Judge Luttig joined. Senior Judge Butzner wrote a dissenting opinion.

COUNSEL

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OPINION

HAMILTON, Circuit Judge:

This age discrimination in employment case is before us on remand from the United States Supreme Court. *See O'Connor v. Consolidated Coin Caterers Corp.*, No. 95-354, 1996 WL 142564 (U.S. Apr. 1, 1996). The Court granted certiorari in part in *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542 (4th Cir. 1995) (*O'Connor I*), *see O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 472 (1995), to decide the following question: whether, assuming Title VII's *McDonnell Douglas* framework is applicable to claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. Secs. 621-634 (West 1985 & Supp. 1994), an ADEA plaintiff need show that he was replaced by someone outside the age group protected by the ADEA in order to establish a prima facie case in a non-reduction-in-force context. Concluding that a plaintiff need not, the Court reversed our holding to the contrary. The Court then remanded the case to us for further proceedings consistent with its opinion. On remand, we have considered whether James O'Connor (O'Connor), now relieved of the burden of establishing that he was replaced by someone outside the protected class (*i.e.*

under forty years of age) in order to establish a prima facie case under the *McDonnell Douglas* burden-shifting proof scheme, has proffered sufficient evidence to withstand Consolidated Coin Caterers Corporation's (Consolidated Coin) motion for summary judgment. We conclude that he has not. Accordingly, we affirm.

I.

The facts of this case and our standard of review are ably set forth in *O'Connor I* and, therefore, do not warrant repeating here. *See O'Connor I*, 56 F.3d at 543-545. We, thus, move directly to analyzing whether, in light of the Court's opinion, O'Connor's proffered evidence of age discrimination can withstand Consolidated Coin's motion for summary judgment. Our analysis considers this question under the burden-shifting proof scheme articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in the non-reduction-in-force context and the reduction-in-force context, and under ordinary standards of proof by direct and indirect evidence.

Under the burden-shifting proof scheme, once a plaintiff establishes a prima facie case of discrimination, a presumption of discrimination arises and the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged employment decision. *See St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993). If the employer carries this burden of production, the presumption "drops out of the picture," *id.* at 2749, and the plaintiff bears the ultimate burden of proving both that the employer's asserted reason was pretextual and that the plaintiff's age was the

true reason for the challenged employment decision. *Id.* at 2752.

We first hold that O'Connor cannot prevail on his ADEA claim in the non-reduction-in-force context under the burden-shifting proof scheme articulated for Title VII cases in *McDonnell Douglas*. O'Connor fails to meet the third element of the prima facie case – at the time of discharge, the plaintiff was performing his job at a level that met his employer's legitimate expectations. *See Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993). In reaching this conclusion, we rely on our express reasoning in *O'Connor I* for our conclusion there that O'Connor failed to meet the nearly identical element in the reduction-in-force context. In *O'Connor I*, after discussion of the evidence, we concluded that O'Connor failed to meet the third element of the prima facie case under the *McDonnell Douglas* proof scheme in the reduction-in-force context – the plaintiff was performing at a level substantially equivalent to the lowest level of those of the group retained. *O'Connor I*, 56 F.3d at 547. There, we recognized that the third element in the reduction-in-force context demanded that O'Connor proffer essentially the same evidence necessary to satisfy the third element of the prima face [sic] case in the non-reduction-in-force context. *See id.*

Next, we hold that O'Connor cannot prevail on his ADEA claim in the reduction-in-force context under the burden-shifting proof scheme articulated for Title VII cases in *McDonnell Douglas* because, for the reasons stated in *O'Connor I*, he fails to meet the third element necessary to establish a prima facie case. *See Mitchell*, 12 F.3d at 1315.

Even assuming arguendo that O'Connor established a prima facie case of age discrimination, after reviewing the evidence, we conclude that he did not meet his ultimate burden of proving that Consolidated Coin's asserted reason was pretextual and that his age was the true reason for its challenged employment decision. In *O'Connor I*, we explained the infirmities with respect to O'Connor's direct evidence in section III.A. and his indirect evidence in section II.B. *See id* at 546-50. The same reasoning applies here with equal force.

Finally, for the reasons stated in *O'Connor I*, we hold that O'Connor cannot survive Consolidated Coin's motion for summary judgment under his proffer of direct and indirect evidence. *See id.*

II.

In conclusion, we affirm the district court's grant of summary judgment in favor of Consolidated Coin.

AFFIRMED.

BUTZNER, Senior Circuit Judge, dissenting:

After the Supreme Court reversed and remanded this case, both parties requested leave to file supplemental briefs and to present oral argument. Their requests, I believe, are reasonable. For reasons stated in Part II of my separate opinion, *see O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 543, 551 (Butzner, J., concurring in part and dissenting in part), I dissent from the disposition of this case by summary judgment. The evidence recounted in Part II of my separate opinion creates a genuine issue of material fact that should be decided by trial.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES O'CONNOR, *Plaintiff-Appellant,* v. CONSOLIDATED COIN CATERERS CORPORATION, *Defendant-Appellee.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Amicus Curiae.*	No. 94-1214

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Robert D. Potter, Senior District Judge.
(CA-91-277-C-C-P)

Argued: January 31, 1995

Decided: April 21, 1995

Amended opinion filed: June 8, 1995

Before HAMILTON and LUTTIG, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge Hamilton wrote the opinion, in which Judge Luttig joined. Senior Judge Butzner wrote a separate opinion, concurring in part and dissenting in part.

ARGUED: George Daly, GEORGE DALY, P.A., Charlotte, North Carolina, for Appellant. Barbara L. Sloan, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. James Bernard Spears, Jr., HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, P.A., Charlotte, North Carolina, for Appellee. **ON BRIEF**: Sharon Samek, GEORGE DALY, P.A., Charlotte, North Carolina, for Appellant. James R. Neely, Jr., Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Lorraine C. Davis, Assistant General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. Jacob J. Modla, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, P.A., Charlotte, North Carolina, for Appellee.

OPINION

HAMILTON, Circuit Judge:

James O'Connor (O'Connor) brought a claim against Consolidated Coin Caterers Corporation (Consolidated) pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. §§ 621-634 (West 1985 & Supp. 1994), contending that Consolidated terminated him because of his age. The district court granted summary judgment in favor of Consolidated, holding that O'Connor could not succeed on his claim of age discrimination. We affirm.

I.

Consolidated operates cafeterias and vending machines primarily for use in industrial plants, businesses, schools and health care facilities. Although separately incorporated, Consolidated operates as a division

of its parent company, Canteen Corporation (Canteen). In 1986, O'Connor was the general manager of Consolidated's northern region known as 4Cs North, which was centered in Raleigh, North Carolina, and served northern North Carolina and southern Virginia; Edward Williams (Williams) was O'Connor's direct supervisor, and Williams reported to Ted Arts (Arts), President of Canteen's Central Division.

In 1989, Canteen restructured its operations so as to have three geographic territories instead of four. As a result of this reorganization, O'Connor became the general manager of 4Cs South, which was based in Charlotte, North Carolina, and served southern and western North Carolina, as well as northern South Carolina, and Mike Kiser (Kiser) of Consolidated took over O'Connor's job as general manager of 4Cs North. Allen Hunter (Hunter) and Ted Finnell (Finnell), employees of Canteen, remained respectively the managers of Canteen's Greensboro/Raleigh and Greenville/Spartanburg operations.

On July 10, 1990, Williams reassigned three geographic territories from O'Connor to Kiser, resulting in the following management scheme:

Kiser	Hunter	O'Connor
4Cs North	Canteen	4Cs South
Manager	Manager	Manager
Burlington	Raleigh	Charlotte
Smithfield	Greensboro	Laurinburg
Tarboro		Shelby
Hickory		
Asheville		
Albemarle		
South Boston		

According to Consolidated, Williams reassigned the territories from O'Connor to Kiser because O'Connor was slow in responding to problem accounts. When this decision was made, Williams did not know that Arts was planning another reorganization to consolidate Canteen and Consolidated's operations.

Sometime subsequent to July 10, 1990, Arts contacted Williams, informing him that he wanted to reorganize Canteen and Consolidated's operations in North and South Carolina to reduce operating costs under the following terms: combine Consolidated with Canteen's North and South Carolina's operations into a single, larger geographic territory, have this new territory managed by Williams, and have Williams combine the management responsibilities of Finnell, Kiser, Hunter, and O'Connor. Subsequently, Williams decided to divide this new territory into two newly-organized districts: the Northern District serving northern North Carolina and southern Virginia, and the Southern District serving southern North Carolina and all of South Carolina. These two new districts were substantially larger in geographic territory than under the previous organizations. In August of 1990, this new "Carolinas Region" was organized as follows:

CAROLINAS REGION

Finnell Southern District	Kiser Northern District
Charlotte	Burlington
Shelby	Smithfield
Laurinburg	Tarboro
Greenville	Raleigh
Spartanburg	Greensboro
Columbia	South Boston
Hickory	
Asheville	
Albemarle	

As a consequence of this reorganization, on August 10, 1990, O'Connor, age fifty-six, was discharged, and Hunter, age fifty-seven, was demoted.

Having created two new, large districts, Williams chose Finnell, age forty, to manage the Southern District, and Kiser, age thirty-five, to manage the Northern District. According to Consolidated, crucial to selecting the managers for the new districts was the fact that there were substantially greater management responsibilities than had been required under the previous organizations and the new districts were substantially larger in geographic area. Williams asserted he selected Finnell and Kiser because he was Finnell's former direct superior, had firsthand knowledge of both men's work and abilities, and considered them competent to handle the greater responsibilities and larger geographic territory.

According to Consolidated, it did not select O'Connor to manage one of the two new districts because they served a greater number of customers, entailed more

accounts, covered a substantially larger geographic territory, and O'Connor was slow in responding to problem accounts. Consolidated asserted that a critical factor in not selecting O'Connor was the fact that even before the second reorganization, Williams had reduced the size of O'Connor's territory from six territories to three. Given that O'Connor was slow with his already-reduced territory, Consolidated concluded that he could not handle an even larger region. Also, Consolidated asserted that O'Connor had not timely responded to a problem involving food delivery in unrefrigerated trucks.

Discrediting Consolidated's reasons for terminating him, O'Connor asserted that he was discharged because of his age; consequently, he brought suit under the ADEA. The district court granted summary judgment in favor of Consolidated. Although observing that this case was not the typical reduction-in-force case characterized by mass layoffs, because here the reduction consisted of only O'Connor and Hunter and O'Connor was essentially replaced by Finnell, the district court nevertheless applied the modified *McDonnell Douglas* four-prong test used in reduction-in-force suits and concluded that O'Connor failed to establish a *prima facie* case because O'Connor failed to present any evidence that Consolidated did not treat age neutrally in deciding to terminate him. Next, the district court held that O'Connor failed to establish his case by the ordinary burden of establishing by direct and/or circumstantial evidence that he was terminated because of his age.

Subsequently, O'Connor moved for a new trial, ostensibly on the basis of newly-discovered evidence. *See* Fed.R.Civ.P. 59(a). O'Connor's proffered evidence was an

affidavit of a former coworker, Phillip Dennis (Dennis). Because there had been no trial, but a grant of summary judgment, the district court construed O'Connor's motion as one for relief from judgment based on newly-discovered evidence and denied it. *See* Fed.R.Civ.P.60(b)(2). This appeal followed.

II.

Rule 56(c) requires that the district court enter judgment against a party who, "after adequate time for . . . discovery fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To prevail on a motion for summary judgment, Consolidated must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) it is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue of material fact has been raised, we must construe all inferences in favor of O'Connor. *See id.* 257-58. If, however, "the evidence is so one-sided that one party must prevail as a matter of law," we must affirm the grant of summary judgment in that party's favor. *Id.* at 251-52. O'Connor "cannot create a genuine issue of fact through mere speculation or the building of one inference upon another." *See Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). To survive Consolidated's motion, O'Connor may not rest on his pleadings, but must demonstrate that specific, material facts exist that give rise to a genuine issue. *See Celotex Corp.*, 477 U.S. at 324. As the Anderson Court explained, the "mere existence of a scintilla of

evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 244. Our review of a grant of summary judgment is plenary. *See Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256, 1260 (4th Cir. 1993).

Contending that his employment was terminated because of his age, O'Connor brought this suit against Consolidated pursuant to the ADEA. In order to establish his claim, O'Connor may rely on the normal methods of succeeding on a civil suit by establishing by a preponderance of the evidence that but for Consolidated's motive to discriminate against him because of his age, he would not have been discharged. *See Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982). O'Connor "may meet this burden under the ordinary standards of proof by direct or indirect evidence relevant to and sufficiently probative of the issue." *EEOC v. Clay Printing Co.*, 955 F.2d 936, 940 (4th Cir. 1992). Alternatively, O'Connor may resort to the proof scheme articulated for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which we have applied to ADEA claims, *see Mitchell v. Data General Corp.*, 12 F.3d 1310, 1314-15 (4th Cir. 1993); *EEOC v. Western Elec. Co.*, 713 F.2d 1011, 1014 (4th Cir. 1983). To establish a *prima facie* case on an ADEA claim under the *McDonnell Douglas* rubric, O'Connor must prove the following elements:

> (1) [he] is in the protected age group; (2) [he] was discharged or demoted; (3) at the time of discharge or demotion, [he] was performing his job at a level that met his employer's legitimate expectations; and (4) following his discharge or

> demotion, [he] was replaced by someone of comparable qualifications outside the protected class.

Id.

A.

Although the parties and the district court characterized the present appeal as a reduction-in-force case, the reduced "force" consisted of only two people, O'Connor and Hunter, and while O'Connor's position was eliminated, he was essentially replaced by Finnell. Thus, the complexities and difficulties of determining what employee was replaced by whom in the typical mass layoff case is simply not an issue here. *See Clay Printing Co.*, 955 F.2d at 937 (twenty-three employees laid off); *Western Elec. Co.*, 713 F.2d at 1013 (reduction-in-force test applied to work force of 225 employees). Also, unlike the typical reduction-in-force case, O'Connor can point to his replacement. *See Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1418 (4th Cir.) (explaining that in reduction-in-force suits determining the employee that replaced the plaintiff may prove difficult, often because jobs have been eliminated or combined), *cert. denied*, 502 U.S. 963 (1991). We are not persuaded, therefore, that this case is properly characterized as a reduction-in-force suit. Thus, application of the reduction-in-force paradigm is inapt here. Applying the *McDonnell Douglas* paradigm, we conclude that O'Connor cannot establish a *prima facie* case because he fails to satisfy the fourth element, *i.e.*, he was not replaced

by someone outside the protected class.[1] Here, Finnell was forty years old, and thus he was within the protected class. *See* 29 U.S.C.A. § 631(a) (West Supp.1994). Having failed to satisfy an element of his claim, O'Connor cannot prevail. The district court, therefore, properly entered summary judgment in favor of Consolidated.

B.

We conclude that even applying the reduction-in-force test to this suit, O'Connor cannot prevail on his claim. In the typical reduction-in-force case, we apply a

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[1] While some circuits hold that an ADEA plaintiff can satisfy the fourth element of *McDonnell Douglas* by showing that he was replaced by someone younger or that younger coworkers were retained in the same or similar positions, even if, as here, the replacements were in the protected age group, *see, e.g., Roper v. Peabody Coal Co.*, No. 94-2694, at * 1 (7th Cir. Feb. 17, 1995); *Douglas v. Anderson*, 656 F.2d 528, 532 (9th Cir. 1981), Fourth Circuit precedent has required a plaintiff to demonstrate that his replacement was outside the protected class to satisfy that element, *see, e.g., Clay Printing Co.*, 955 F.2d at 943 (explaining that because the replacements in a reduction-in-force suit were within the protected class, the plaintiffs had to demonstrate that the employer did not treat age neutrally in making its employment decisions); *Western Elec. Co.*, 713 F.2d at 1014 (holding that "in the usual ADEA case," a plaintiff must prove that he "was replaced by someone of comparable qualifications outside the protected class"); *cf. Lovelace*, 861 F.2d at 238-39 & n. 5 & 242-43 n. 13 (noting in dicta that it did not rely on the fact that the plaintiff was replaced by someone in the protected class in reaching its decision and noting further that "[w]hether the absolute and relative ages of [plaintiff] and replacement may be factually relevant to the discrimination issue [was] . . . a different matter").

modified version of the *McDonnell Douglas prima facie* standard:

> (1) the employee was protected by the ADEA; (2) he was selected for discharge from a larger group of candidates; (3) he was performing at a level substantially equivalent to the lowest level of those of the group retained; and (4) the process of selection produced a residual work force of persons in the groups containing some unprotected persons who were performing at a level lower than that at which he was performing.

Mitchell, 12 F.3d at 1315. This fourth element is usually characterized by stating that a plaintiff must produce "some other evidence that the employer did not treat age neutrally." *Western Elec. Co.,* 713 F.2d at 1015. We have made this modification in such cases because the plaintiff's position may have been eliminated or it may be difficult for the plaintiff to show precisely who replaced him. *See id.* at 1014. While we have noted that "the fourth element [of the *McDonnell Douglas* scheme] will not fit well in most reduction-in-force cases," we have concluded that an ADEA plaintiff "should not be permitted to establish a 'prima facie case' by satisfying only the first three elements." *Id.*

Indisputably, O'Connor satisfies elements one and two, *i.e.,* he is in the protected class and was discharged. The third element requires that O'Connor perform at a level substantially equivalent to the lowest level of those of the group retained. Essentially, this element demands that O'Connor perform his job satisfactorily, thereby

meeting Consolidated's legitimate expectations. According to Consolidated, O'Connor cannot satisfy this element because even prior to the reorganization that gave rise to the two new district manager positions, O'Connor was slow in dealing with problem accounts, his territorial responsibilities had already been greatly reduced, and he experienced a problem with food delivery in an unrefrigerated truck. Thus, Consolidated posits, O'Connor fails the third prong.

Conversely, O'Connor contends that his performance was satisfactory and that his evidence tended to establish that Consolidated did not treat age neutrally in discharging him. To support these contentions, he relies on: (1) a good performance review dated January 1990 that reviewed the latter part of 1989 along with a large bonus he received in 1989 for good work and comparative salary data; (2) Finnell and Kiser, the younger men, one of whom was outside the protected class, were retained while he and Hunter, the older men, were respectively discharged and demoted; and (3) testimony of Williams that O'Connor had made progress with individual accounts and 4Cs South made some improvement, despite the fact that 4Cs South generally had a lower profit margin than 4Cs North.

This evidence, however, does not tend to establish that O'Connor was a satisfactory employee because Williams did not consider these facts in his decision to discharge O'Connor; rather, Consolidated had already substantially reduced O'Connor's geographic territory, and given this fact, he was not a contender for one of the new positions. The 1990 review of 1989, 1989 bonus, salary data, and some improvement in 4Cs South are

irrelevant because O'Connor was not performing well in August of 1990, the time of termination. *See Anderson v. Stauffer Chem. Co.*, 965 F.2d 397, 401 (7th Cir. 1992) (stating that a 1984 evaluation, even if given in December of 1984, and a pay raise given at the start of 1985 was not relative to a discharge on May 1, 1985). Moreover, at the time Consolidated decided to terminate O'Connor, Williams did not know of Art's decision to consolidate Canteen's and Consolidated's organizations. With respect to the evidence that O'Connor was improving, even if O'Connor were making some progress with respect to some accounts, that does not negate the fact that he did not react timely to other problem accounts or that 4Cs South's performance was still not up to par. Because under Art's reorganization the geographic territories were even larger, and O'Connor's territory was already reduced, O'Connor's evidence tending to establish that he was working up to expectations does not create a genuine issue of material fact.

The fourth prong of the reduction-in-force test requires that O'Connor show "that persons outside the protected class were retained in the same position *or* that there was some other evidence indicating that the employer did not treat age neutrally in deciding to dismiss the plaintiff." *Herold v. Hajoca Corp.*, 864 F.2d 317, 320 (4th Cir.), *cert. denied*, 490 U.S 1107 (1988). We conclude that O'Connor failed to demonstrate Consolidated did not treat age neutrally in discharging him.[2] Focusing on retaining Finnell and Kiser, O'Connor is not comparable to Kiser or Finnell since his territory was reduced

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[2] *See* n. 1.

prior to his termination due to his slow response to problem accounts. Because O'Connor is not comparable to these men, comparing performance reviews and salaries is inapt. *See Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 533 (10th Cir. 1994) (opining that in an age discrimination case, the plaintiff must be comparable to her replacement). In deciding to keep Finnell and Kiser and discharge O'Connor, Williams' decision was based on Finnell and Kiser's ability to handle an enlarged geographic territory; three territories were reassigned to Kiser because O'Connor was slow in responding to problem accounts; the fact that these men could handle the larger territories was critical to the decision to discharge O'Connor. Also, there is nothing in the record disclosing Hunter's ability or performance during the relevant time. Therefore, no comparison can be made between Hunter and Finnell or Kiser. In fact, a month before O'Connor was discharged, Williams considered Kiser's ability to manage a larger geographic territory superior to that of O'Connor. The decision to discharge O'Connor, therefore, was not grounded in invidious discrimination, but rather on the age-neutral reason that O'Connor's performance did not recommend him for the job, while Finnell and Kiser's did. O'Connor's evidence does not create a genuine issue of material fact that Consolidated did not treat age neutrally in making its employment decisions. Additionally, the case law reveals examining a small pool of employees is not probative of discrimination. *See Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511 (4th Cir.) (comparing four individuals is too small a sample to be probative of discrimination in a ADEA suit), *cert. denied*, 115 S.Ct. 666 (1994); *Simpson v. Midland-Ross Corp.*, 823 F.2d

937, 943 & n. 7 (6th Cir. 1987) (stating that sample of seventeen in an age discrimination case was suspect) (collecting cases); *see also Iturbe v. Wandel & Golterman Technologies, Inc.*, 23 F.3d 401 (4th Cir. 1994) (unpublished) (*per curiam*) (stating that a "court cannot properly draw an inference of discrimination from a pool of only three employees"). Under these precedents, no inference of discrimination may be drawn in this suit. We find that O'Connor failed to satisfy the fourth prong.

III.

As stated, an ADEA plaintiff can establish his claim under the proof scheme articulated in *McDonnell Douglas* or under the ordinary standards of proof used in civil cases. Here, O'Connor appeared to proceed under both proof schemes. Having concluded that O'Connor cannot prevail under the *McDonnell Douglas* paradigm, we analyze his claim under the standards of proof by direct and circumstantial evidence used in civil cases.

To succeed on his ADEA claim under the direct standard of proof scheme, O'Connor must establish the following elements: "(1) that he . . . was an employee covered by the [ADEA], (2) who suffered an unfavorable action by an employer covered by the [ADEA], and (3) that age was a determining factor in the action in the sense that but for [Consolidated's] intent to discriminate on the basis of age, [O'Connor] would not have been subjected to the employment action." *Clay Printing Co.*, 955 F.2d at 941 (internal quotation marks omitted). To defeat a motion for summary judgment under this scheme, O'Connor must " 'produce direct evidence of a

stated purpose to discriminate [on the basis of age] and/or circumstantial evidence of a stated purpose to discriminate [on the basis of age] of sufficient probative force to reflect a genuine issue of material fact.' " *Id.* (quoting *Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988)) (alteration in original). "Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact . . . without any inference or presumptions." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir. 1993). The same summary judgment standard applies under this proof scheme.

A.

The direct evidence on which O'Connor relies to establish his case are three statements about age-related matters made by Williams. While derogatory remarks may be direct evidence of age discrimination, *see Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429, 1433 (4th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), the decisional law "clearly reflects that isolated and ambiguous statements . . . 'are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination,' " *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989) (quoting *Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 268 n. 2 (6th Cir.), *cert. denied*, 480 U.S. 919 (1987)). Discriminatory remarks concerning age, therefore, cannot be stray or isolated statements. According to the Seventh Circuit, "[u]nless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of a discriminatory discharge." *McCarthy v. Kempter Life Ins. Co.*, 924 F.2d 683, 686-87 (7th Cir. 1991). As this court has opined, there must be some

"nexus . . . between the alleged discriminatory statements and *any* of the employment decisions made by the [employer]." *Clay Printing Co.*, 955 F.2d at 942; *see also Figures v. Board of Pub. Utils.*, 967 F.2d 357, 360-61 (10th Cir. 1992) (noting that racial comments are not probative of discrimination unless they are linked to the challenged action); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990) (holding that certain statements unconnected to the employment decision-making process are simply stray remarks that do not demonstrate discriminatory intent). With these principles in mind, we consider the challenged statements.

1.

The first statement was made two days before O'Connor's discharge. Williams remarked that "[i]t's about time we get some young blood in this company." (J.A. 122). This comment was made in response to a comment by Don Dillingham, another Consolidated employee, that his fiftieth birthday was fast approaching. This apparently humorous comment is not probative of age discrimination. First, as the *Birkbeck* court explained, comments such as this are innocuous and create no inference of age bias. The *Birkbeck* court ruled that the statement " 'there comes a time when we have to make way for younger people,' " simply lacks discriminatory intent and is more accurately understood as a commentary on the fact that all people age. *Birkbeck*, 30 F.3d at 511-12; *see also Clay Printing Co.*, 955 F.2d at 942 (holding that an employer's comment that the employer needed to " 'attract newer, younger people' " and needed " 'young

blood' " failed to establish direct evidence of age discrimination); *Gagne,* 881 F.2d at 314 (holding that the employer's comment that he " 'needed younger blood' " did not raise a material fact with respect to establishing age discrimination). Second, there is no nexus linking this statement to O'Connor's termination as required by *Clay Printing Co. See Cone,* 14 F.3d at 531 (ruling that "[i]solated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions"). Additionally, this comment does not evince an intent to discharge an older employee, but merely to attract some young ones. *See Clay Printing Co.,* 955 F.2d 942.

2.

The second statement, made two weeks prior to O'Connor's discharge, consisted of the following: " 'O'Connor, you are too damn old for this kind of work.' " (J.A. 125). O'Connor testified, however, that he did not remember what he and Williams were discussing when this comment was made or whether this comment was in relation to a business matter. (J.A. 124-25). Thus, there is no evidence that this statement was made in the context of replacing O'Connor. Without this requisite nexus, this statement evinces no discriminatory intent. *See id.*

3.

The third statement, uttered in either June or July of 1990, was made in connection with O'Connor's ability to play golf. That statement was made under the following circumstances: O'Connor, Williams, and Steve Carpman,

another Consolidated employee, were watching a golf match on television. *O'Connor* stated that he "couldn't walk that many rounds of golf for five days to play 18 holes for five days." (J.A. 127). Williams responded to this comment by stating that O'Connor was just "too old." Again this inane statement was in reply to O'Connor's jocular declaration that he was too old to play eighteen holes of golf. Here again, there is nothing linking this remark with O'Connor's discharge. We agree with the district court that these remarks are simply stray comments that do not establish evidence of age discrimination.

B.

We explained the infirmities with respect to O'Connor's indirect evidence in section IIB. The same reasoning obtains here. The district court dismissed this evidence as insufficiently probative to establish O'Connor's claim, and we agree with this conclusion.

IV.

O'Connor raises two other issues, but they merit scant attention. First, he asserts that the district court erred in refusing him certain discovery requests. Reversal of discovery rulings is proper "only on a clear showing of abuse, and 'it is unusual to find abuse of discretion in these matters.' " United Presbyterian Church in the *United States v. Reagan*, 738 F.2d 1375, 1382 (D.C.1984) (quoting *Swanner v. United States*, 406 F.2d 716, 719 (5th Cir. 1969)). We have carefully examined the discovery issues and conclude that the district court did not err

with respect to these rulings. Second, O'Connor contends that the district court erred in denying his Rule 59 motion, which the district court construed as a Rule 60(b)(2) motion, based on Dennis' affidavit. We have examined this affidavit, and we agree with the district court that this evidence fails to satisfy the criteria for granting relief under either Rule 59 or Rule 60. *See Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989).

V.

We conclude that regardless of how O'Connor's claim of age discrimination is viewed, he failed to raise a genuine issue of material fact precluding summary judgment. We therefore affirm the district court's grant of summary judgment in favor of Consolidated. We have examined carefully O'Connor's discovery request and his Rule 59 motion and conclude that they are without merit; thus, we affirm those rulings as well. The judgment of the district court is, in all respects, affirmed.

AFFIRMED.

BUTZNER, Senior Circuit Judge, concurring in part and dissenting in part:

I

I reluctantly concur in the court's conclusion that O'Connor cannot make out a *prima facie* case of discrimination under the framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), because he was not replaced by someone outside the protected class.

This circuit's version of the *McDonnell Douglas* formula requires an ADEA plaintiff to demonstrate that he was replaced by someone outside the protected age group. *See, e.g., EEOC v. Clay Printing Co.*, 955 F.2d 936, 943 (4th Cir. 1992); *EEOC v. Western Elec. Co.*, 713 F.2d 1011, 1015 (4th Cir. 1983). These cases compel my concurrence.

Such an absolute requirement, however, has no justification in law or policy. The Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., states that its objective is "to prohibit arbitrary age discrimination." 29 U.S.C. § 621(b). The Act contains no language permitting employers to favor a younger employee over an older one on the basis of age simply because the younger employee is within the protected age group.

As a method of proof, the *McDonnell Douglas* paradigm was "not intended to be rigid, mechanistic or ritualistic." *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978). The age of a replacement employee should be a relevant, but not dispositive, factor for a court to consider when deciding whether the plaintiff has established a *prima facie* case under the *McDonnell Douglas* framework.

Most other circuits take this approach and observe that a plaintiff need only show he was replaced by someone younger, whether outside or within the protected age group. *See Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1335 n. 2 (1st Cir. 1988); *Haskell v. Kaman Corp.*, 743 F.2d 113, 122 (2d Cir. 1984); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792-93 (3d Cir. 1985); *Bienkowski v. American Airlines*, 851 F.2d 1503, 1506 (5th Cir. 1988); *Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 153-56 (7th Cir. 1994);

Rinehart v. City of Independence, 35 F.3d 1263, 1265-66 (8th Cir. 1994); *Douglas v. Anderson*, 656 F.2d 528, 531-33 (9th Cir. 1981); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988); *Carter v. City of Miami*, 870 F.2d 578, 582-83 (11th Cir. 1989); *Cuddy v. Carmen*, 694 F.2d 853, 857 (D.C.Cir. 1982); *see also Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 237 n. 5 (4th Cir. 1982) (dictum). *But see LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 379 (6th Cir. 1993) (requiring plaintiff to show that replacement was outside protected age group).

II

I respectfully dissent from the court's conclusion that, under ordinary standards of proof, O'Connor failed to raise an inference of discrimination. An ADEA plaintiff may prevail on a discrimination claim by demonstrating, through direct or circumstantial evidence, that but for an employer's motive to discriminate on the basis of age the plaintiff would not have been discharged. *Clay Printing*, 955 F.2d at 940; *Lovelace*, 681 F.2d at 239.

O'Connor has presented sufficient evidence of discriminatory motive to survive summary judgment. He testified in his deposition that Ed Williams, his supervisor, told him two weeks before his discharge, "O'Connor, you're too damn old for this kind of work." Williams denied making this statement.

Additionally, in his postjudgment motion, O'Connor provided the court with the affidavit of Phillip Dennis, who was a coworker of O'Connor. In his affidavit Dennis states that Williams told him Ted Arts, Williams's boss, had ordered Williams to fire O'Connor. When Dennis

asked why O'Connor was fired, Williams responded "that all of us were getting old, that Jim [O'Connor] was getting old." Because this affidavit was not reasonably available earlier, I believe the district court should not have rejected it.

These statements create a genuine issue of material fact that should be decided at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A jury could reasonably infer from Williams's statement or from the information contained in the Dennis affidavit that age was the determining factor in O'Connor's discharge. Because a trier of fact should determine O'Connor's claim, I would vacate the judgment of the district court and remand for a full evidentiary hearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-91-227-P

JAMES O'CONNOR, Plaintiff, v. CONSOLIDATED COIN CATERERS CORPORATION, Defendant.	MEMORANDUM OF DECISION AND ORDER (Filed July 27, 1993)

THIS MATTER is before the Court on motion, filed June 16, 1993, of Consolidated Coin Caterers Corporation ("Consolidated") for summary judgment. Plaintiff James O'Connor filed a response and an affidavit on July 6, 1993, and July 9, 1993. Consolidated followed with a reply on June 19, 1993.

O'Connor's complaint alleges a violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* Specifically, O'Connor alleges that although Consolidated told him that his position was eliminated as part of a reduction in force, Consolidated actually filled his position with a younger man. Now, after the conclusion of discovery, Consolidated has moved for summary judgment.

Summary Judgment Standard

Summary judgment is appropriate when the pleadings, responses to discovery, and the record reveal that no

genuine issue of any material fact exists and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing that no genuine issue of any material fact exists and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After the moving party has met its burden, the non-moving party must come forward with specific facts showing that evidence exists to support its claims and that a genuine issue for trial exists. *Id.; Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see* Fed. R. Civ. P. 56(e) (in response to motion for summary judgment, "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"). When considering motions for summary judgment, courts must view facts and inferences in the light most favorable to the party opposing the motion for summary judgment. *Matsushita*, 475 U.S. at 587-88; *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). When, however, the evidence from the entire record could not lead a rational fact-finder to find for the non-moving party, no genuine issue for trial exists and summary judgment is appropriate. *Matsushita*, 475 U.S. at 587.

Factual Background

O'Connor began his employment with Consolidated in 1978. Consolidated principally operates cafeterias and

vending machines in industrial plants. O'Connor managed a territory for Consolidated while he was in its employ. In December of 1989, O'Connor became the district manager for the region known in the company as "4Cs South." Four Cs South, centered in Charlotte, encompassed much of southern and western North Carolina until July of 1990 when Ed Williams, O'Connor's immediate supervisor, reallocated some of O'Connor's territory to another manager. On August 9, 1990, Consolidated terminated O'Connor and demoted one other manager as part of a reorganization or reduction-in-force.

Prior to O'Connor's termination, Consolidated and its parent company, Canteen Corporation (collectively "Consolidated/Canteen"), operated three districts in North Carolina and one district in South Carolina. After the reorganization and the consequent reduction-in-force of managers in August of 1990, Consolidated and Canteen operated only two districts in North Carolina and South Carolina collectively. As noted above, O'Connor was terminated and another manager, Allen Hunter, demoted to achieve the reduction in force. Both O'Connor and Hunter were over 50 at the time. Consolidated/Canteen retained Ed Finnell, age 40 at the time, and Mike Kiser, age 35 at the time. O'Connor's old district was combined into the new Four Cs South which was placed under the supervision of Finnell. The new Four Cs South also included Finnell's old district, Canteen's operations in Columbia, Spartanburg, and Greenville, South Carolina.

Discussion

To prove a case of age discrimination, the plaintiff must demonstrate that: he was an employee covered by the Act at the time of the unfavorable employment decision, *i.e.*, that he was over forty years of age; he suffered an unfavorable employment action at the hands of an employer covered by the Act, *e.g.*, discharge; and, the unfavorable employment action occurred "under circumstances in which the employee's 'age was a determining factor' in the action in the sense that " 'but for' his employer's motive to discriminate against him because of his age, he would not [have suffered the action]." *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 238 (4th Cir. 1982) (citation omitted).

The plaintiff may prove these substantive elements in either of two ways. First, the plaintiff may rely on ordinary principles of proof just as in any case. In other words, the plaintiff could rely on any direct or indirect evidence admissible under the rules of evidence to prove his case by a preponderance of the evidence. If the plaintiff were not able to carry his burden of proof, the defendant-employer would be entitled to judgment as a matter of law and the case would not go to the jury. *Id.* at 239 Second, the plaintiff may rely on the scheme of proof initially applied to Title VII "disparate treatment" cases and known as the *McDonnell-Douglas* proof scheme. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1980). This scheme of proof favors the plaintiff initially by allowing him to rather easily establish a presumption of discrimination that, once established, compels the

defendant-employer to demonstrate a legitimate, non-discriminatory reason for the unfavorable employment decision.

The *prima facie* case of age discrimination under the *McDonnell-Douglas* proof scheme requires that the plaintiff prove four objective elements, to-wit: (1) he was in the protected age group class under the Act at the time of the unfavorable employment decision; (2) he was discharged; (3) at the time of the discharge, he was performing his job at a level that met his employer's legitimate expectations; and (4) following the discharge, he was replaced by someone of comparable or lesser qualifications outside the protected class. *Equal Employment Opportunity Comm. v. Western Elec. Co.*, 713 F.2d 1011, 1014 (4th Cir. 1983). The Court must grant summary judgment if the plaintiff does no present evidence of each of these four elements; "the claimant should not be permitted to establish a 'prima facie case' by satisfying only the first three elements." *Id.* at 1014-1015.

Although the Fourth Circuit has recognized that the fourth element, as stated, is not rigidly applicable to reduction-in-force cases, *id.* at 1014, it has not foreclosed the application of the fourth element to such cases. In fact, the Court has stated that even in reduction in force cases, the employee must demonstrate that the employer "did not treat age neutrally in its [employment decisions]." *Id.* at 1015; *Equal Employment Opportunity Comm.*, 955 F.2d 936, 943 (4th Cir. 1992) (*citing Western Electric*, 713 F.2d at 1014-1015). *Western Electric* was a large scale reduction in force in which 225 employees were adversely affected. *Id.* at 1013. The instant reduction is not nearly so

large or complex; only two employees, O'Connor and Hunter, were adversely affected.

The fourth element of the *McDonnell-Douglas* proof scheme does not normally "fit" well in reduction-in-force cases because the adversely affected employee cannot point to a replacement with whom the discharged employee would logically compare himself. *Id.* at 1014. In this case, however, there is no such problem. As noted above, the reorganization combined O'Connor's old district, Four C south, with the South Carolina district. Finnell was the manager of the old South Carolina district. The most obvious choices to supervise the new, enlarged district would have been Finnell or O'Connor. Because Consolidated/Canteen chose Finnell to head the new district and take over O'Connor's responsibilities, Finnell essentially replaced O'Connor. Indeed, O'Connor testifies in his affidavit that Consolidated/Canteen replaced him with Finnell. Affidavit of Plaintiff (filed July 9, 1993) at ¶ 9.

In the instant case, therefore, O'Connor has not produced evidence of the fourth element of age discrimination under the *McDonnell-Douglas* proof scheme. The fourth element requires that the employee-plaintiff show that the employer has replaced the plaintiff with a person outside the protected class.[1] Alternatively, the employee-

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[1] The Court is fully aware of cases in other circuits that in which the various circuits decline to apply this rule and merely require the age-discrimination plaintiff to demonstrate that he was replaced by a younger person even if the younger person is also in the protected class. *See Carter v. City of Miami*, 870 F.2d 578, 583 n.14 (11th Cir. 1989) (compiling cases). The Court declines to follow these nonbinding precedents.

plaintiff may present other objective evidence that the employer has not treated age neutrally. The protected class consists of all employees age 40 and over at the time of the unfavorable action. 29 U.S.C.A. § 631 (West 1985 & Supp. 1993). At the time of the unfavorable action, August 9, 1990, Finnell was 40 years old.[2] Because Finnell was within the protected class and O'Connor has presented no other evidence of that Consolidated/Canteen did not treat age neutrally in deciding to terminate him, the Court finds that O'Connor cannot rely on the *McDonnell-Douglas* proof scheme.

O'Connor, however, may prove his case – and defeat this motion for summary judgment – using traditional principles of proof. 713 F.2d at 1014. The principle issue in dispute here is motivation. O'Connor proffers both direct and indirect evidence in his effort to demonstrate discriminatory intent. The direct evidence consists of three remarks that Ed Williams, the decisionmaker for Consolidated/Canteen, made. First, O'Connor testified that Williams remarked – two days prior to O'Connor's termination – "It's about time we started to get some young blood in this company." O'Connor deposition at 44. Williams made this comment in response to the statement of Don Dillingham, another employee, that he was about to turn 50.

Second, O'Connor testified that Williams remarked – within two weeks of O'Connor's termination – "O'Connor, you're two [sic] damn old." O'Connor dep. at 46.

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[2] Finnell turned 41 on August 27, 1990, three weeks after O'Connor's termination.

O'Connor also testified that Williams remarked – during the same conversation – "O'Connor, you're too damn old for this kind of work." O'Connor, however, also testified that he did not remember anything else about the conversation, including the context of the remarks, the general subject of the conversation, or the length of the conversation. O'Connor dep. at 46-47.

Third, O'Connor testified that Williams stated – sometime during June or July of 1990 – that O'Connor was too old to play eighteen holes of golf for five consecutive days. O'Connor, Williams and another employee were watching a playoff of a golf tournament. While watching the tournament, O'Connor remarked that he "couldn't walk that many rounds of golf for five days to play 18 holes for five days." To this comment, Williams responded that O'Connor was "too old." O'Connor dep. at 49.

O'Connor has not presented any evidence that links these three remarks to the decision to discharge him. Stray comments cannot prove age discrimination. In order for O'Connor to rely on these comments to prove age discrimination, he must demonstrate that they were related to the decision to discharge him. *Equal Employment Opportunity Comm. v. Clay Printing Co.*, 955 F.2d 936, 942 (4th Cir. 1992). An age discrimination plaintiff must demonstrate that a nexus exists between allegedly discriminatory statements and the unfavorable employment decision at issue. *Id.*

In the instant case, O'Connor has not demonstrated any nexus between Williams' three comments and the decision to discharge him. The first comment, "It's about

time to get some young blood in this company," was made in response to an employee's own comment on his age. This comment did not indicate an intent to discharge older employees. In *Clay Printing*, the decisionmaker had made comments such as, "too many people have been around here too long and make too much money," and "if employees had been there 10 years or more, they needed to move on," along with references to the company's need to "attract newer, younger people" and "young blood," were not probative of age discrimination or a discriminatory purpose. *Id.* at 942. The Court found that these comments reflect the need of all companies to hire young employees constantly in order to remain vital. The Court noted Chief Judge Haynsworth's comment on this need and the failure of these type comments to show age discrimination:

> In any enterprise, today's juniors will be tomorrow's seniors. Today's seniors can help create a foundation for tomorrow's growth and prosperity, but future realization of the potential of an enterprise lies principally with those who will be in positions of leadership and responsibility in the future.

Id. (*quoting Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980)). Likewise, the Court finds that Williams' comment on the need for young blood in the company is not probative of a discriminatory intent.

Williams' second comment, "O'Connor, you're too damn old for this kind of work," also is not probative of discriminatory intent. The context of the statement must

indicate discriminatory intent. O'Connor, however, testified that he did not remember the context or the subject matter of the comment. As such, plaintiff has not established a nexus between this comment and the decision to discharge him.

Williams made the third comment, that O'Connor was "too old," in response to O'Connor's admission that he could not walk eighteen holes of golf on five consecutive days. Because O'Connor was not a golfer, but rather a general manager in a catering and vending business, Williams' comment has no probative value. Clearly, Williams' comment did not have any nexus to the decision to terminate O'Connor.

O'Conner [sic] has also proffered indirect evidence of discriminatory intent. O'Conner [sic] argues that he has "substantial indirect evidence tending to show that he was performing well, and that he was better qualified to continue employment than was Ted Finnell. . . . " O'Connor's "substantial evidence," however, consists only of his comparison with Ted Finnell. Most of the indirect evidence that Plaintiff proffers is nothing more than a historical narrative of Plaintiff's employment with Consolidated. The last paragraph of the "Concluding Portion of Memorandum in Response to Motion for Summary Judgment" contains the only possibly probative evidence:

> Plaintiff had a better track record than did Finnell. At the time of plaintiff's termination, his next previous performance evaluation was "commenable [sic] minus," whereas Finnell's was "competent minus." Plaintiff placed consistently higher in his salary class than did Finnell within his salary class.

The first statement is merely a conclusion, not evidence. The second statement, although true, is not probative of

the performance of each person at the time of the termination. The evaluations of Finnell and O'Connor were made eight to nine months before the decision to terminate O'Connor. This type of evidence – historical evidence of job performance removed in time from the date of the unfavorable decision – is not probative of discriminatory intent. O'Conner [sic] has presented no evidence to support the conclusion that he was fulfilling the legitimate expectations of his employer *at the time of the discharge* (or at least performing on the same level as Finnell). Plaintiff simply has presented no specific evidence of the level of his performance relative to Finnell's performance at the time of discharge. As such, O'Conner [sic] has not carried his burden of proof. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-257 (1986) (plaintiff, in response to adequately-supported motion for summary judgment, has burden of producing evidence that would support jury verdict).

Because O'Conner [sic] cannot present the objective evidence necessary to rely on the *McDonnell-Douglas* scheme of proof and cannot present direct or indirect evidence necessary to prevail under traditional principles of proof, the Court must grant summary judgment for Defendant.

NOW, THEREFORE, IT IS ORDERED that Consolidated's motion for summary judgment will be GRANTED. The Court will file simultaneously with this

memorandum of decision a judgment dismissing the plaintiff's action with prejudice.

This the 27th day of July, 1993.

/s/ Robert D. Potter
ROBERT D. POTTER
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1214
CA-91-277-C-C-P

JAMES O'CONNOR

Plaintiff - Appellant

v.

CONSOLIDATED COIN
CATERERS CORPORATION

Defendant - Appellee

(Filed
July 11, 1996)

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Amicus Curiae

On Petition for Rehearing with Suggestion
for Rehearing In Banc

Appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Judge Butzner dissents from the order denying rehearing.

For the Court,

/s/ Bert M. Montague
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1214

O'Connor v. Consolidated Coin

MANDATE

(FILED July 19, 1996)

The judgment of this Court dated 6/5/96 takes effect today.

BERT M. MONTAGUE
CLERK